91-896

No.: _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1991

EDITH PERRY,

Petitioner,

v.

COMMAND PERFORMANCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID R. CULP
COUNSEL FOR PETITIONER
7000 Crittenden Street
Philadelphia, PA 19119
(215) 248-9361

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Patterson v. McLean "post-contract-formation" rationale should be limited to Title VII cases, since to extend it to an Edith Perry leaves a victim with no federal civil rights remedy and is inconsistent with the Supreme Court's concern with eradicating racial discrimination in our society.

2. Whether respondent hair salon is responsible in a Section 1981 action under the Doctrine of Respondeat Superior for the racially-discriminatory actions of its employee, who the district court found had refused to serve Edith Perry because she is black.

3. Even if Respondeat Superior is not applicable in a Section 1981 case, whether respondent hair salon is liable under Section 1981 when the salon's owners and supervisor are involved in the

discriminatory conduct, in that the supervisor condones her employee's discrimination by failing either to require her to service Mrs. Perry or to terminate her employment and the salon owners knowingly create a situation that promotes and encourages racial discrimination.

LIST OF OTHER INTERESTED PARTIES

None.

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ORDERS AND OPINIONS BELOW TO BE REVIEWED

The Order and Opinion of the U.S. District Court for the Eastern District of Pennsylvania, entered on November 26, 1989, set out in the Appendix at pages 3-13. The Order and Opinion of the U.S. Court of Appeals for the Third Circuit, dated August 30, 1990, set out in the Appendix at pages 14-30. The Opinion and Order of the U.S. District Court for the Eastern District of Pennsylvania dated March 27, 1991, set out in the Appendix at pages 31-46; and the Order of the Third Circuit Court of Appeals dated September 11, 1991, set out in the Appendix at pages 1-2.

JURISDICTION

The U.S. District Court for the Eastern District of Pennsylvania had jurisdiction, pursuant to 28 U.S.C. Section 1331.

The U.S. Court of Appeals for the Third Circuit had jurisdiction, pursuant to 28 U.S.C. Section 1291.

The U.S. Supreme Court has jurisdiction, pursuant to 28 U.S.C. Section 1254(1), to review the judgment of the Third Circuit Court of Appeals, dated September 11, 1991.

FEDERAL STATUTES INVOLVED

42 U.S.C. Section 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Plaintiff Edith Perry, who is black, brought this action in the federal district court for the Eastern District of Pennsylvania against defendant Command Performance alleging it had violated 42 U.S.C. Section 1981 by denying her service at its hair styling salon because of race and color. Plaintiff Edith Perry also invoked the pendent jurisdiction of the district court for the intentional infliction of emotional distress. The District Court had jurisdiction pursuant to 28 U.S.C. Section 1331.

Defendant filed a Motion for Summary Judgment, requesting that the trial court dismiss Edith Perry's 42 U.S.C. Section 1981 Claim. On November 22, 1989, the district court granted defendant's Motion for Summary Judgment, dismissing Edith Perry's Section 1981 action, finding

controlling the Supreme Court decision of Patterson v. McLean Credit Union, 190 S. Ct. 2363 (1989). Plaintiff Edith Perry appealed the district court's dismissal of her 42 U.S.C. Section 1981 action to the Third Circuit Court of Appeals, and on August 30, 1990, a three-member panel of the Third Circuit reversed the district court and remanded the case for trial. 913 F. 2d 99 (3rd Cir. 1990).

Plaintiff Edith Perry, who is black, brought this complaint against defendant hair salon on the basis that it had violated her civil rights under 42 U.S.C. Section 1981 by denying her service at its hair styling salon.

On October 12, 1987, Edith Perry's husband, Chris Perry, called Defendant hair salon and made a 12:00 p.m. appointment with the salon to have Edith's hair washed and set. After she arrived,

defendant's Assistant Manager and the only supervisor on duty that day, Helene Kugler, who is white, told Edith Perry that she was ill and asked Edith if she would mind having another hair stylist Beth Abbott (white) do her hair. Edith Perry said it would be fine.

Defendant's Assistant Manager, Ms. Kugler, orally requested that defendant's employee Beth Abbott do her hair. Defendant's employee refused to do so, becoming loud and abusive, stating, "No, no, no, no! I don't do black hair! No, no, no, no! Not today!" When Edith Perry told Ms. Abbott that she only wanted a wash and set like every other patron in the salon, Ms. Abbott responded sarcastically and emphatically: "I just don't do black people's hair! Oh, no, I'm not going to do your hair! I'm from New Hampshire and I don't deal with blacks!"

Defendant's employees could see that Edith Perry was visibly upset. She started to cry. She asked to call the owner of Defendant Command Performance and tried dialing the Security Department to have them page her husband in the shopping center to take her home. Edith Perry asked defendant's employee, "How can you say that to me? All I wanted was a wash and set." Ms. Abbott replied: "I don't do Black people's hair." Although Edith was crying, another patron, a white woman, told her, "Why don't you go to your own place?"

At the time of the incident, defendant's employee, Ms. Abbott, had over nine years of experience as a hair dresser, and she has provided services to over 22,000 patrons, but has never once provided services to a black person. She testified at trial that she never intended

to provide hair dressing services for a black person. In contrast, during the eleven years she was a hair dresser, she never once denied a white person services. Ms. Abbott was an extremely experienced, technically qualified hair dresser, who, by her own admission, was certainly capable of doing a wash and set on anyone's hair. In addition, she had performed services on all different types of hair -- different textures, different styles, and different thickness, and was capable of performing work on all types of hair.

On October 12, 1987, however, Ms. Kugler, Defendant's assistant manager, who was in charge of supervising the salon, did not order or command Ms. Abbott to service Edith, nor did she offer to help Ms. Abbott service Edith.

Pennsylvania law requires that a hair

stylist in Pennsylvania perform services on all different types of hair and regardless of one's race and color. Although defendant hair salon solicits black patrons in its advertisements to induce them to frequent their salons, because its research showed that black patrons spent more money than whites at hair salons, the owners took no steps to insure that their hair dressers would do the hair of blacks and comply with the Pennsylvania law. The owners did not tell Ms. Abbott when she was hired that it actively solicited blacks, that a significant portion of its business at the salon was black, and that she would have to do their hair. Instead of taking steps to insure that all the hair dressers understood they would have to do the hair of blacks, defendant salon hired a black stylist, Pam, whose job was primarily to

service the black clientele, and defendant salon steered most of its black clientele to Pam.

The District Court made a finding that Ms. Abbott's refusal to perform a wash and set for Edith Perry was racially discriminatory. (District court opinion, Finding of Fact #10, App. at 34). In addition, Ms. Abbott had put the owners on notice that she did not wish to service blacks. The owners of defendant company testified at trial that Ms. Abbott had a racially-troubling incident with another black patron previous to her discrimination with Edith, but at no time after the first incident did the owners or a supervisor discipline or order Ms. Abbott to serve all patrons regardless of color, in compliance with Pennsylvania law. In fact, the District Court made a finding that after Ms. Abbott

discriminated against Edith Perry, the owners of the salon did not terminate Ms. Abbott nor did they reprimand her or take any disciplinary action against her in any way. District court opinion, Finding of Fact #14, App. at 35. Ms. Abbott testified that they told her not to worry, that the incident with Edith Perry was no reflection on her.

What the owners did do was to send a gift certificate to Edith Perry, telling her that the salon had made a mistake and that it should have "made arrangements for you to be served by Pam . . . ," the black hair dresser. The owners, because it was good business, also sent a gift certificate to the white client who had shouted at Edith, "Why don't you go to your own place?!"

Immediately after the incident, Edith Perry started to break out in hives. For

several months she had insomnia. She underwent medical treatment for her physical problems and in addition sought therapy with a psychiatrist. As a result of the incident, she had trouble working and lost a major client for the Four Seasons Travel Agency, Inc., of which she is the President and owner.

After trial, the district court, on March 27, 1991, found that Defendant hair salon's employee had refused to service plaintiff Edith Perry because of her race but entered judgment for defendant hair salon. Plaintiff Edith Perry appealed the District Court judgment to the Third Circuit Court of Appeals and on September 11, 1991, a three-member panel, without an opinion, affirmed the District Court's decision that the Defendant hair salon had not discriminated, despite a finding that its employee had.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT PETITIONER'S REQUEST FOR CERTIORARI TO REVIEW THE LIMITS OF THE PATTERSON V. MCLEAN DECISION, SINCE IF IT IS NOT LIMITED, VICTIMS OF RACIAL DISCRIMINATION SUCH AS EDITH PERRY WILL BE DENIED ANY FEDERAL CIVIL RIGHTS REMEDY, AND SUCH A RESULT IS INCONSISTENT WITH THIS HONORABLE COURT'S CONCERN WITH ERADICATING RACIAL DISCRIMINATION IN OUR SOCIETY.

In its March 28, 1991 decision after trial, the federal district court for the Eastern District of Pennsylvania made a finding that defendant's employee, Beth Abbott, had refused to perform a wash and set on Plaintiff Edith Perry "because of Plaintiff's race." D. Ct. opinion, Finding of Fact #10, App. at page 34. Nevertheless, the district court also found that the defendant hair salon was not liable for its employee's discrimination, and in so doing relied heavily on the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S.

Ct. 2363 (1989). For instance, at Paragraphs 4, 5, and 6 of its Conclusion of Law, App. at pages 36-38, the district court noted that the race discrimination against Edith Perry occurred after "a race-neutral contract was established between Plaintiff and Defendant for hairstyling services." Conclusion of Law #5, App. at pages 37-38. The Court found that Edith Perry "thus cannot establish a Section 1981 claim because the discriminatory conduct here occurred after formation of the contract between Plaintiff and Defendant. Patterson, 491 U.S. 164." Conclusion of Law #6, App. at page 38. The district court's opinion stands logic on its head, since if only certain hair dressers will service blacks, then blacks are not allowed to make contracts on the same basis as white persons. White patrons, at defendant's

salon can be and are serviced by any hair dresser at the salon -- but that was not true for Edith or for other Blacks. The district court's misapplication of Patterson shows the difficulty the lower federal courts have had in applying the reach of Patterson. (See, e.g., Gersman v. Group Health Assoc., Inc., 931 F.2d 1565 (D.C. Cir. 1991); Prather v. Dayton Power and Light Co., 918 F.2d 1255 (6th Cir. 1990))

The reach of Patterson outside the context of Title VII is an important constitutional question that this Honorable Court should examine, since if Patterson is not limited, there will be a raft of cases and situations where people such as Edith Perry will have no effective federal civil rights protection for the discrimination that they, admittedly, have suffered.

Patterson dealt with racial harassment on the job and with the denial of a promotion. In deciding that racial harassment on the job was not within the reach of Section 1981, the 5-4 majority in this Honorable Court noted that such conduct "is actionable . . . under the more expansive reach of Title VII," 109 S. Ct. at 2367, which prohibits discrimination on the basis of race in employment or the conditions of employment. See also Matthews v. Freedman, 882 F. 2d 83 (3rd Cir. 1989), in which the Third Circuit cites Patterson and notes the expansive reach of Title VII to employment cases.

This Honorable Court should limit the reach of Patterson since the Patterson case is distinguishable from the present one in that the Patterson case dealt with an employment situation, where there was

an alternate federal civil rights remedy for one discriminated against in an employment context. In an employment situation, the employee has an alternate federal civil rights remedy pursuant to Title VII, and the five-person majority in Patterson made much of the fact that employees discriminated against have such a remedy, noting that the Court "may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." Id. at 2375. By contrast, in the present case, Edith Perry and other blacks like her have no federal civil rights protection if the federal courts are to extend Patterson as the Federal District Court and Court of Appeals did in the instant case. Under the district court's reading of Patterson, a business establishment could make an oral contract

with a black person and then subsequently deny services to the patron on the basis of race, and the patron discriminated against would not have recourse under any federal civil rights statute, since Title VII deals only with employment situations, and since under the district courts interpretation of Patterson Section 1981 would not cover such action.

Such an interpretation of Patterson would allow certain types of racial discrimination to go unrectified and is inconsistent with the Supreme Court's opinion in Patterson: In Patterson the Court notes "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 109 S. Ct. at 2371. In Patterson the Court emphasizes that "commitment" again and again, stating that "every pronouncement of this Court and

myriad acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." Id. And again, the Court states, "The law regards man as man, and takes no account of his color when his civil rights as guaranteed by the supreme law of the land are involved." Id. The district court's interpretation of Patterson would eradicate the gains blacks have made since the Civil War for equal rights.

In further discussion the parameters of Section 1981, the five person majority stated that Section 1981 "prohibits, when based on race, the refusal to enter into a contract with someone . . . . " 109 S. Ct. at 2372; see also 109 S. Ct. at 2376. In the present case, defendant by and through its employee, Beth Abbott, refused to enter into a contract with Edith Perry

because of Edith's race and color when Ms. Abbott flew into a racial tirade and refused to give Edith Perry a wash and set. Simply stated, Edith Perry has been denied her right to make and enforce a contract with defendant because of her race and has been denied the equal benefit of the laws as enjoyed by white citizens.

Petitioner Edith Perry respectfully requests that this Honorable Court grant her Writ of Certiorari to review the reach of Patterson and to decide a vitally important federal civil rights issue. If Patterson is not limited, Petitioner fears that for certain types of racial discrimination, Blacks will have lost any right to have redress under the federal civil rights laws. That result could not have been intended by this Honorable Court, for to do so means that our nation will once again have returned to a time

when Blacks rode in the back of the bus and when "separate" meant "equal."

II. THE SUPREME COURT SHOULD GRANT PETITIONER'S REQUEST FOR CERTIORARI IN ORDER TO GIVE GUIDANCE TO THE FEDERAL COURTS AS TO WHETHER THE RESPONDENT SUPERIOR DOCTRINE IS APPLICABLE TO A SECTION 1981 ACTION, AND IF SO, TO DETERMINE THE PARAMETERS OF THAT DOCTRINE AND THE CIRCUMSTANCES UNDER WHICH AN EMPLOYER WILL BE HELD VICARIOUSLY LIABLE FOR THE ACTIONS OF ITS EMPLOYEES.

The Supreme Court has not definitively spoken as to whether the respondent superior document is applicable in a Section 1981 action to hold a business vicariously liable for the racially-discriminatory actions of its employees. The Supreme Court's guidance is needed to aid the federal court system in construing Section 1981 actions uniformly. Although the Supreme Court has not definitely spoken, several Justices have acknowledged their acceptance of the respondent superior doctrine in Section 1981 actions. Thus, in Jett v. Dallas Independent School District, 491 U.S. 701

(1989), the Honorable Justices Brennan, Marshall, Blackmun, and Stevens, in a dissenting opinion stated that in a Section 1981 action a local governmental body could be held liable under the doctrine of respondent superior. Id. at 740. The five justices who comprised the majority in Jett did not find respondent superior applicable to a governmental body but did not express an opinion as to whether the doctrine was applicable to a private employer or business. Earlier Supreme Court cases have flirted with whether and to what extent the doctrine of respondent superior is applicable to certain types of civil rights cases. Thus, in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Honorable Justice Rehnquist, writing for the majority, held that in Title VII cases, where an "employer" is defined to include any

"agent" of the employer, the employer may be vicariously liable in some instances but not in others. Section 1981, of course, has no such limiting language as does Title VII as to an "agent." As a result, if the respondent superior doctrine is applied in a Section 1981 context, the question is raised as to how broad "vicarious liability" should be. And in General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982), Justice Rehnquist, writing for the majority, analyzes a Section 1981 case under the doctrine of respondeat superior, "On the assumption that respondeat superior applies to suits based on Section 1981 . . . ." Id. at 375. Concurring in that opinion, the Honorable Justice O'Connor, with whom Justice Blackmun joins, notes that after the case has been remanded to the District

Court, "nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under Section 1981 by attempting to prove the traditional elements of respondeat superior." Id. at 404. Unfortunately, as is shown in Edith Perry's case, the lower federal courts have had difficulty applying those "traditional elements of respondeat superior" consistently. Petitioner respectfully submits that they have had trouble applying vicarious liability concepts to a Section 1981 case because they are not sure of the parameters of that doctrine in a Section 1981 action. After all, since there is no limiting language in Section 1981, Section 1981 could be read in such a way that an employer would be held strictly liable for the discriminatory actions of its employees if said employees are acting

generally within the scope of their work relationship. Support for this reading of vicarious liability can be found in Justice Rehnquist's opinion in the General Building Contractors Association case, where he states that the "doctrine of respondeat superior, as traditionally conceived and as understood by the District Court . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." Id. at 392.

In the General Building Contractor's Association case, both Justice Rehnquist and Justice O'Connor stated that the respondeat superior doctrine is applicable when the employer or principal has some degree of control over the activities of another. Id. at 392, 403-04. Justice

Rehnquist further defined the doctrine:

> Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service."

Id. See also Longo v. Pennsylvania Electric Co., 618 F. Supp. 87 (W.D. Pa. 1985), which notes that the hallmark of a master-servant relationship is that the master has the right to control the result of the work and to direct the manner in which the work shall be accomplished.

In Edith Perry's case there can be no question but that Ms. Abbott was an agent and servant of her employer, defendant hair salon, and that said defendant "controlled or had the right to control

the conduct" of Ms. Abbott, and also had the right to control the conduct of its Assistant Manager, Ms. Kugler. Yet not once did the owners of defendant hair salon ever direct that Ms. Abbott had to service all patrons of the salon regardless of their race or color, even though such was a requirement of the Pennsylvania state licensing laws, and even though defendant salon actively solicited black customers, because, as the owner of the salon testified at trial, their research indicated that blacks spent more money at hair salons than whites.

In deciding Edith Perry's case, however, the District Court and the Third Circuit Court of Appeals did not follow the principles enunciated by Justices Rehnquist and O'Connor in General Building Contractors Association, as the District and Circuit courts misinterpreted the

"agency" relationship in that case and totally ignored the employment relationship. See District Court's Conclusion of Law #11, App. at 40-41, wherein the district court held that "there is no basis for . . . (respondeat superior) liability without, at the least, an agency relationship," citing a different section of Justice Rehnquist's opinion in the General Building Contractors Association case, 458 U.S. at 395. Material in parenthesis added. The Third Circuit affirmed without opinion. Interestingly and inconsistently, the District Court in its first opinion on this case, dated November 22, 1989, found that Beth Abbott was an "agent" of Defendant hair salon. App. at 10.

The District Court's and the Third Circuit's failure to address the vicarious liability issue in Edith Perry's case is

inconsistent with how other federal courts have handled similar situations, and thus the Supreme Court should take certiorari to provide uniform criteria to the federal courts for construing Section 1981 actions. In Edith's case, the District Court and Third Circuit simply failed to apply a respondeat superior doctrine to Edith Perry's situation.

Despite the District Court's and Third Circuit's rulings in Edith's case, several other jurisdictions and circuit courts have held that the doctrine of respondeat superior is applicable to Section 1981 cases to hold an employer vicariously liable for the actions of its employee. E.g., Watson v. Fraternal Order of Eagles, 915 F. 2d 235 (6th Cir. 1990); Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988); Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987);

Floyd-Mayers v. American Cab Co., 732 F. Supp. 243 (D.D.C. 1990); Malone v. Schenk, 638 F. Supp. 423 (C.D. Ill. 1985); Haugabrook v. City of Chicago, 545 F. Supp. 276 (N.D. Ill. 1982); Jones v. Local 520, International Union of Operating Engineers, 524 F. Supp. 487 (S.D. Ill. 1981); Croswell v. O'Hara, 443 F. Supp. 895 (E.D. Pa. 1978); Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 469 F. Supp. 329 (E.D. Pa. 1978).

In Jones v. Local 520, International Union of Operating Engineers, 524 F. Supp. 487 (S.D. Ill. 1981), for example, the district court noted that, "There is nothing in Section 1981 to lead a court to believe that respondeat superior is inapplicable to actions brought under the statute, and every court which has engaged

in a meaningful analysis of the issue has so held." Id. at 492. In fact, in holding that the respondeat superior doctrine is applicable to a Section 1981 action, a Illinois United States District Court analyzed that the unequivocal language of Section 1981, as well as its legislative history, "manifests Congress' purpose to enact sweeping legislation implementing the thirteenth amendment to abolish all the remaining badges and vestiges of the slavery system." Haugabrook v. City of Chicago, 545 F. Supp. 276 (N.D. Ill. 1982).

If employers are not held liable for the actions of their employees in carrying out job-related functions, then those badges and incidents of slavery will not be fully abolished, and the vestiges of that caste system will remain, forever a part of the fabric of this country. It

means that Edith Perry and other blacks can be forced to wait outside a restaurant to be serviced by that restaurant or that she can be forced in a hair salon to be served only by a black hairdresser when other hairdressers are available but who refuse to serve her because she is black. And yet those employees are all performing functions or duties for their employer.

In factual situations similar to Edith Perry's, courts in jurisdictions other than the Third Circuit have held employers liable under the doctrine of respondeat superior for the actions of their employees. In Malone v. Schenk, 638 F. Supp. 423 (C.D. Ill. 1985), the federal district court held that an employer, who owned a tavern, was vicariously liable when his employee refused to sell a black woman a lottery ticket because of her race. The district court rejected

defendant's argument that if the employee refused to sell the plaintiff lottery tickets because of her race, such a refusal was not within the scope of his authority. In so holding, the court cited to numerous other cases where a principal was held liable in instances where an agent refused to rent or sell because of race. Id. at 425. Similarly, in Edith Perry's case, Ms. Abbott refused to sell hair dressing services to Edith because of her race, and thus the doctrine of respondeat superior should be held applicable to defendant hair salon.

In another case, Floyd-Mayers v. American Cab Co., 732 F. Supp. 243 (D.D.C. 1990), the District of Columbia District Court also discussed the parameters of the respondeat superior doctrine. In that case black prospective passengers had brought a Section 1981 action against a

taxi cab company alleging that certain drivers refused to pick up blacks and transport them to their destination. Despite defendant taxicab company's argument that the drivers were outside the scope of their employment, the court refused to grant defendant taxicab company's motion for summary judgment. In discussing the respondeat superior doctrine, the court noted that an employee's act is within his or her employment "if the purpose of the act is, at least in part, to further the employer's business and if the act is not unexpected in view of the employee's duties." Id. at 246. In further discussing the "foreseeability" or "expectation" prong of this test, the court held that, for vicarious liability to attach, the employee's tortious act must be "at least incidental to the

conduct authorized by the employer." Id.

Based on the legal criteria discussed above, the Floyd-Mayers court held there was sufficient evidence for reasonable jurors to find that the drivers committed the alleged acts of discrimination, at least in part, for the purpose of furthering the company's business -- that those acts of discrimination were incidental to their job functions as drivers. The court noted that the company had offered no evidence that the drivers were acting as anything other than the company's drivers when the discriminatory acts occurred or that the drivers did not intend to further the company's business by hiring out their taxicabs. Id. "Moreover," the court held, "a reasonable factfinder could conclude that the discriminatory acts were a foreseeable aspect of the taxicab drivers' duties."

Id. at 247.

Similarly, in Edith Perry's case, Ms. Abbott was employed by defendant hair salon when she committed her discriminatory acts. And these acts were "incidental to the conduct authorized by the employer," since the employer authorized Ms. Abbott to perform hair styling services, and the discrimination was as to her refusing to provide such services, just as in Floyd-Mayers, the taxicab drivers were authorized to drive cabs and the refusal to provide services was therefore incidental to their job functions. In both cases, the discriminatory acts "were a foreseeable aspect of the employees' duties." Just as in Floyd-Mayers cab drivers picked who would ride in their cabs on the basis of race, in Perry, Ms. Abbott chose who she would serve on the basis of race.

Similar to the District of Columbia District Court's rationale in Floyd-Mayers is the First Circuit Court of Appeal's opinion in Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987). In Springer the First Circuit reversed a district court's dismissal of a Section 1981 claim against the Postal Service. Plaintiff, a black postal clerk, alleged he had been terminated from the Postal Service on the basis of his race when two white employees brought to the attention of the Postal Service false charges against him. After investigation by the Postal Service, the plaintiff was discharged. Although the plaintiff did "not allege racial animus on the part of the Postal Service itself," he asserted that the Postal Service was liable for its employees' actions under the respondeat superior doctrine, and that the employees' racial animus was therefore

imputed to their employer. Id. at 880. The First Circuit concurred, holding that the district court's granting of a motion for summary judgment was improper, since the employees had "made their allegedly false accusations of Springer (the plaintiff) in their capacities as Postal Service employees." Id. at 881. In Perry Ms. Abbott was also operating in her capacity as a hair dresser employed by defendant company when, on the basis of racial animosity, she refused to perform a wash and set on a black woman, Edith Perry.

In yet another case, Haugabrook v. City of Chicago, 545 F. Supp. 276 (N.D. Ill. 1982), a district court held that a corporate employer may be held liable on the theory of respondeat superior under Section 1981. In that case plaintiff, who is black, alleged that he was wrongfully

arrested, searched, kidnapped and beaten by Chicago police officers. On the basis of the evidence, the court held that it "cannot conclude that . . . the City knew or should have known of any alleged violent propensities of" the officers. Nevertheless, the court held that the City could be held strictly liable on plaintiff's Section 1981 claim under the doctrine of respondeat superior, the court noting that there is "ample authority . . . for the proposition that private corporate defendants may be held liable on a respondeat superior basis under section 1981 for the racially discriminatory conduct of their employees." Id. at 278, 279.

It would be a grave injustice if, on the facts of the present case, Edith Perry is denied a remedy under Section 1981, and Petitioner respectfully requests that the

Supreme Court grant her Writ of Certiorari. In addition, this Honorable Court's granting certiorari and providing the federal courts with guidance on the applicability and scope of the respondeat superior doctrine to Section 1981 cases would provide a greater uniformity of decisions than is presently the case.

III. EVEN IF THE RESPONDEAT SUPERIOR DOCTRINE IS NOT APPLICABLE TO SECTION 1981 CASES, THE SUPREME COURT SHOULD DETERMINE UNDER WHAT CIRCUMSTANCES A BUSINESS IS LIABLE, SUCH AS IN THE PRESENT CASE WHERE THE SALON'S OWNERS AND SUPERVISOR ARE INVOLVED IN THE DISCRIMINATORY CONDUCT BY NOT ORDERING THE EMPLOYEE TO WASH AND SET EDITH'S HAIR AND WHERE THE SALON OWNERS KNOWINGLY CREATE A SITUATION THAT PROMOTES RACIAL DISCRIMINATION.

Even if this Honorable Court were to find that Ms. Abbott's racially-discriminatory actions were not imputable to her employer-salon under the respondeat superior doctrine in a Section 1981 action, defendant hair salon should nevertheless be liable to Edith Perry on her Section 1981 claim since the owners of defendant salon and the Assistant Manager on duty authorized and condoned Ms. Abbott's racial discrimination against Edith Perry: The supervisor, Ms. Kugler, never ordered Ms. Abbott to wash and set Mrs. Perry's hair, and the salon owners knowingly created a situation that

promoted and encouraged racial discrimination.

Universally, courts which have not applied a respondeat superior doctrine to a case, finding the doctrine inapplicable on the law or the facts, have nevertheless held that the employer may still be held liable. For example, in Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986), the Seventh Circuit held that in a Title VII and Section 1981 action, an employer could be held liable on two bases: One, the employer would be liable under the respondeat superior doctrine for those intentional wrongs of his employees that are in furtherance of the employer's business. Two, the employer is directly liable, independently of respondeat superior, for an employee's intentional acts, even if not in furtherance of the employer's business,

that the employer could have prevented by reasonable care in hiring, supervising, or if necessary firing the tortfeasor. Id. at 1422. Thus, the court held that an employer who has reason to know of discrimination is blameworthy if he condones the activity and does nothing. In this regard, the court held that failure to take reasonable steps to prevent discrimination can make the employer liable if management-level employees knew, or in the exercise of reasonable care should have known, of the discrimination. Id. at 1421, 1422. Under the second basis of liability, the "employer's liability thus is not strict, as it would be under respondeat superior; his only duty is to act reasonably in the circumstances." Id. at 1422.

Other courts have applied an analysis as to employer liability that is similar

to the Seventh Circuit's analysis in Hunter. Thus, in a Title VII action, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988), in which a female employee claimed she was constructively discharged as a result of a hostile work environment caused by sexual harassment, the Eleventh Circuit held that the employer would be liable if "the employer knew or should have known of the harassment and failed to take prompt action to remedy the violation." Id. at 904.

Both the Hunter and Huddleston courts, therefore, apply a similar rationale, finding that the employer is liable if management-level or supervisory employees are aware of the discrimination, or should be aware of said discrimination, and condone, such actions by doing nothing about it or by failing to take prompt

remedial action. (Accord, Cain v. City of Chicago, 619 F. Supp. 1228 (D.C. Ill. 1985), a Section 1981 case where a black man was shot by Chicago police officers, wherein the court held that the city was subject to Section 1981 liability on a respondeat superior basis and further held that the police superintendent could also be held liable if he "had direct knowledge or had approved of the defendant police officers' conduct." Id. at 1233. See also Lee v. Wyandotte County, Kansas, 586 F. Supp. 236 (D.C. Kan. 1984), which held that former county jail inmates could recover for Section 1981 violations against the county if they could demonstrate the existence of a requisite "affirmative link" between the county and at least one of the county employees alleged to have violated the inmates' rights; and Berger v. Iron Workers

Reinforced Rodmen Local 210, 843 F.2d 1395, 1430 (D.C. Cir. 1988), which held that an international union may be held liable if it knowingly authorizes or approves of the local union's acts.)

What the above-cited cases show is that supervisors and management cannot sit idly by, with blinders on, while other employees violate a person's civil rights. Management and supervisory employees must act reasonably under the circumstances, and they cannot condone or foster racial discrimination. To do so is the "affirmative link" that makes the employer liable for civil rights violations of its employees.

Even if the Supreme Court does not apply the respondeat superior doctrine to Edith Perry's case, the Assistant Manager and supervisor at defendant salon, Ms. Kugler, and the owners of defendant salon,

the Glovers, have condoned and fostered racial discrimination, and, therefore, they are the affirmative link that make defendant salon liable for the actions of Ms. Abbott under Section 1981.

For example, the Assistant Manager and only supervisor at defendant hair salon, Ms. Kugler, asked Ms. Abbott to do a wash and set on Edith Perry's hair, since Ms. Kugler wasn't feeling well. Ms. Abbott's response was loud and swift: "No, no, no, no! I don't do black hair. No, no, no, no! Not today!" E. Perry, Cir. Ct. App. 67; Kugler, Cir. Ct. App. 240, 255; M. Glover, Cir Ct. App. 119-20; R. Glover, Cir. Ct. 140. Ms. Abbott further responded: "I just don't do black people's hair! Oh, no, I'm not going to do your hair! I'm from New Hampshire and I don't deal with blacks!" Abbott, Cir. Ct. App. 172, 173, 174; E. Perry, Cir. Ct.

App. 67, 68, 97, 98, 99, 103, 104; D. Certo, Cir. Ct. App. 106, 107, 109, 110.

The Assistant Manager's response to her employee, Ms. Abbott, was to condone and authorize Ms. Abbott's racial discrimination against Edith Perry. For example, the Assistant Manager admitted at trial that a wash and set is a routine hair procedure and further admitted she knew that Ms. Abbott was an experienced hair dresser, and as a result assumed Ms. Abbott had done all types of hair. The Assistant Manager also acknowledged that she certainly believed that Ms. Abbott was capable of performing a wash and set on Edith's hair, and she further acknowledged she knew that Pennsylvania law required a hairdresser to service all patrons regardless of whether they are white or black.

Nevertheless, despite knowing all o

these facts, the Assistant Manager, after Ms. Abbott's racial tirade, did not order Ms. Abbott to do the wash and set on Edith Perry's hair. E. Perry, Cir. Ct. App. 69; Abbott, Cir. Ct. App. 174; Kugler, Cir. Ct. App. 242-43. In failing to so order and direct Ms. Abbott, the Assistant Manger condoned and authorized Ms. Abbott's racial discrimination against Edith Perry. The fact is, the Assistant Manager should have offered Ms. Abbott a choice: either do a wash and set for Edith Perry or be terminated. If she had so ordered her employee and given her that option, this suit would never have been brought. Instead, she ratified Ms. Abbott's racial discrimination and failed to act "reasonably in the circumstances." See Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d at 1422. As outlined in Huddleston v. Roger Dean Chevrolet, Inc.,

845 F.2d 900 (11th Cir. 1988), the Assistant Manager knew of the discrimination "and failed to take prompt action to remedy the violation." Id. at 904. Thus, defendant hair salon should be held liable under Section 1981 for the racially-discriminatory actions of its agents, Ms. Abbott and the Assistant Manager, and for the Assistant Manager's condoning and authorizing Ms. Abbott's discrimination against Edith Perry.

In addition, defendant hair salon is liable to Edith Perry under Section 1981 for Ms. Abbott's refusal on the basis of race to service Edith Perry, since the salon owners and assistant manager knowingly created a situation that promoted and encouraged racial discrimination.

Although defendant hair salon actively solicits the business of blacks

through advertising to induce them to frequent their salons, the owners took no steps to insure that their hairdressers would do the hair of blacks and comply with the Pennsylvania law.

The owners solicit black patrons not out of any kindness to blacks but because it is "good business": The owners solicit black patrons because their research showed that black patrons spent more money than whites at hair salons. An owner of defendant salon, Mr. Glover, testified at trial that they solicit black customers "because it's good business. Black clientele, and there are statistics, spend disproportionate to their population percentage, if you will, of the overall population. They tend to have higher average tickets ... and they tend to return on a more frequent basis. It's good business." R. Glover, Cir. Ct. App.

210.

Despite advertisements attempting to lure blacks to defendant salon, the owners and Assistant Manager did not supervise its personnel to make sure blacks were not treated like second-class citizens once they arrived at the salon. The owners and assistant manager did not tell Ms. Abbott when she was hired that defendant salon actively solicited blacks, that a significant portion of its business was black, and that she would have to comply with the Pennsylvania law requiring her to do their hair.

Instead of taking steps to insure that all the hair dressers understood they would have to do the hair of blacks, defendant salon hired a black stylist, Pam, whose job was primarily to service the black clientele, and defendant salon steered most of its black clientele to

Pam. Abbott, Cir. Ct. App. 167; M. Glover, Cir. Ct. App. 124-25. For example, after Ms. Abbott refused to perform a wash and set for Edith Perry, an owner, Mrs.Glover, wrote a letter to Ms. Kugler, the Assistant Manager, telling the Assistant Manager that she should have offered Edith "an appointment with Pam on Tuesday ..." See also M. Glover letter to Edith Perry, where Mrs. Glover steers Edith to Pam. Cir. Ct. App. 256.

Thus, the pervasive atmosphere and policy at defendant hair salon was that not all hairdressers had to service black customers, since hopefully the salon could find one hairdresser who would be willing to serve a black even though others would not. Simply stated, the owners and the assistant manager knowingly condoned and created a situation that promoted and encouraged racial discrimination and

allowed the seeds of discrimination to prosper.

That the owners condoned and created a situation that promoted racial discrimination can also be seen in their response to Ms. Abbott's refusal to serve Edith Perry because Edith is black. As the district court found, defendant hair salon "did not admonish or otherwise punish Ms. Abbott for her failure to wait on Plaintiff." District court opinion, Finding of Fact #14, App.42-43. Ms. Abbott, for example, testified that after her refusal to give Edith a wash and set, the owners told her, "Don't worry. Don't worry about anything," that the refusal to serve Edith "would not reflect on you in any way."

Not only did Ms. Abbott discriminate against Edith Perry, but the actions of the Assistant Manager and the owners have

implicated defendant salon directly in the discrimination. They have condoned, tolerated, authorized, and been a part of that discrimination, so that even if the doctrine of respondeat superior is not applied to Ms. Abbott's actions, the actions of the Assistant Manager and the owners are an "affirmative link" that makes defendant salon liable for the violation of Edith Perry's civil rights.

That the defendant salon should be held liable on the facts of the instant case is clearly implied by the rationale of the above-cited cases, such as Hunter, Huddleston, Cain, Lee and Berger. See also Levendos v. Stern Entertainment, slip op., Civil no. 89-3791 (3rd Cir. 1990), in which in a Title VII action the Third Circuit adopted a rationale similar to the Hunter-Huddleston-Cain line of cases. In Levendos, the court quoted with approval

from the Supreme court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), in which the Supreme Court held that "the mere existence of a grievance procedure and a policy against discrimination ..." does not insulate the employer from liability. Id. at 60-61, discussed at p. 8-9 of Levendos slip op.

Thus, in Edith Perry's case, that defendant advertises for and solicits black customers should not insulate the company from liability. A company cannot solicit black customers and then treat them as second-class citizens, effectively seating them in the back of the bus.

Moreover, defendant owners and their assistant manager had notice that Ms. Abbott did not wish to serve black customers, and yet they did nothing to insure that Ms. Abbott would comply with Pennsylvania law and serve all patrons,

regardless of race or color.

The Assistant Manager, Ms. Kugler, for example, testified that previous to Ms. abbott's refusal to do a wash and set for Edith, that she and Ms. Abbott had had discussions about Ms. Abbott's reluctance to do the hair of black clients. And yet the Assistant Manager never informed Ms. Abbott that Pennsylvania law required her to do all hair, regardless of whether the person was white or black, and that she would have to comply with the law or be terminated.

The owners also had notice: Ms. Abbott, herself, testified that she believes she told the owners at defendant salon that she was reluctant to do the hair of black patrons. In addition, the owners of defendant company testified they had knowledge that Ms. Abbott had a racially-troubling incident with another

black patron previous to her discrimination against Edith. But at no time after the first incident did the owners or a supervisor discipline or order Ms. Abbott to serve all patrons regardless of color, in compliance with Pennsylvania law. Mr. Glover, the owner, for example, said he never ordered her to do the hair of all patrons, and in fact did not even talk to Ms. Abbott after the first incident.

Although at trial defendant owners argued that Ms. Abbott's refusal to serve Edith was not because of race but because she needed training in doing such procedures as a simple wash and set, the district court rejected the argument, finding that Ms. Abbott had discriminated against Edith Perry because of her race. District Court Opinion, Finding of Fact #10, App. 34. The ludicrousness of the

need-for-training argument can be seen in the owner's handling of that issue. Between the first racially-troubling incident and the incident with Edith Perry, they did not provide any training to Ms. Abbott. Even after the incident with Edith Perry, the owners did not follow up to see if she received any training. Mrs. Glover stated that they may not have given Ms. Abbott any training after her refusal to provide Edith Perry with a wash and set "because we were very short-handed and our first objective, of course, is to be able to service clients." "Clients," apparently to Mrs. Glover, do not include blacks. As the district court found, in holding that Ms. Abbott had racially discriminated against Edith Perry, the need-for-training argument was a sham.

What is shown, through the testimony

and transcript, is not only that Ms. Abbott discriminated against Edith Perry, but that the owners and assistant manager at defendant salon had their imprint on that October 12, 1987 incident as well; they authorized, and condoned, and could have prevented, and could have remedied. They are just as responsible as if they personally had refused to give Edith Perry a wash and set on October 12, 1987 because of her race, and as managers and owners their actions and inactions are imputed to defendant hair salon, making defendant salon liable under Section 1981 for the racial discrimination against Edith Perry.

Thus, the lower courts in Edith Perry's case have stripped Section 1981 of its effectiveness in remedying racial discrimination. Petitioner respectfully requests that this Honorable Court grant Certiorari and send a clear message to the

lower courts that we can no longer condone or tolerate racial discrimination, or sit idly by while the seeds of discrimination prosper.

CONCLUSION

For the foregoing reasons, in order to secure uniformity in 42 U.S.C. Section 1981 cases and to secure justice for all Blacks similarly situated to Edith Perry, Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

This 9th day of December, 1991.

Respectfully submitted,

David R. Culp

David R. Culp
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1283

EDITH PERRY,

Appellant

v.

COMMAND PERFORMANCE

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. Civil No. 89-2284)
District Judge:
Honorable James McGirr Kelly

Submitted under Third Circuit Rule 12(6)
September 4, 1991

BEFORE:
STAPLETON, GREENBERG, and ALDISERT,
Circuit Judges

JUDGMENT ORDER

After consideration of the

contentions raised by appellant, it is

ORDERED and ADJUDGED that the judgment of the district court entered on March 28, 1991, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

DATED: September 11, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDITH PERRY	:	
	:	CIVIL ACTION
v.	:	
	:	
COMMAND PERFORMANCE	:	NO. 89-2284

MEMORANDUM AND ORDER

J. M. KELLY, J. NOVEMBER 22, 1989

BACKGROUND

Pursuant to Federal Rule of Civil Procedure 56, Defendant, Command Performance, has filed a motion for summary judgment with respect to all claims alleged in the complaint of Plaintiff, Edith Perry. The complaint alleges a federal claim arising under 42 U.S.C. Section 1981 and a pendent state law claim of intentional infliction of emotional distress. On November 8, 1989, this court held a hearing on Defendant's motion for summary judgment.

FINDINGS OF FACT

1. Plaintiff's claim arises from an incident which took place on October 12, 1987 at the King of Prussia Court location of the Defendant's hair-styling salons.

2. Plaintiff, a black woman, arranged a 12:00 p.m. appointment for October 12, 1987 to have her hair washed and set by Defendant, Command Performance at King of Prussia.

3. Shortly after Plaintiff arrived at the salon for her appointment, Helen Kugler, one of Defendant's hair-stylists, asked the Plaintiff if the would object to having one of the other hair-stylists wash and set her hair as Ms. Kugler was ill and did not want to spread germs.

4. The Plaintiff did not object.

5. Plaintiff had been served on other occasions at the hair salon by Ms. Kugler.

6. Helen Kugler acted in the position of assistant manager at the King of Prussia salon.

7. At that point, Ms. Kugler approached Beth Abbott, the other hair-stylist in the salon that afternoon, and orally requested Ms. Abbott to wash and set Plaintiff's hair.

8. Abbott responded, "I don't do black hair! No, no, no, no! Not today!" When the Plaintiff told Ms. Abbott that she only wanted a wash and set, Ms. Abbott responded with the following statements: "No, no, no, no. I'm from New Hampshire. I don't deal with Blacks."

9. Ms. Kugler then offered to set the Plaintiff's hair or have some

other hairstylist do it but Plaintiff refused Ms. Kugler's offer.

10. As a result of this incident, Plaintiff claims she suffered an episode of stress-related hives, depression, insomnia, underwent psychiatric and medical treatment for her injuries and suffered a work loss.

CONCLUSIONS OF LAW

1. The Supreme Court has recently spoken directly to the issue of conduct actionable under 42 U.S.C. §1981 in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989).

2. Section 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. The underlying facts in Patterson involved, inter alia, a claim brought by an employee against her employer, McLean Credit Union, for racial harassment in the workplace and a state

tort law claim of intentional infliction of emotional distress. The Court held that the conduct the employee labeled actionable racial harassment was post-formation conduct by the employer relating to the terms and conditions of employment. The Court stated:

> This type of conduct, reprehensible though it be if true, is not actionable under §1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

109 S.Ct. at 2374.

4. The Patterson Court did not limit its §1981 analysis to employment contracts. As a general matter, the Court reasoned:

> interpreting §1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, since §1981 covers all types of contracts,

> not just employment contracts. Although we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law.

109 S.Ct. at 2376.

5. The Patterson majority's reading of §1981 does not touch upon the legislative history of the statute, but instead gives a lengthy discussion of 42 U.S.C. §2000e, Title VII, a federal statutory remedy apparently not raised by the petitioner. Following the rationale of Patterson to its logical conclusion, §1981 would appear as legal grounds for a claim only if the defendant refused to enter into a contract with the plaintiff altogether or on terms different than those offered white patrons (e.g., charged black patrons more than white patrons for identical services). This reading of §1981 by the Supreme Court in Patterson

narrows appreciably a plaintiff's right to proceed in §1981.

6. The conduct complained of by the Plaintiff involved racial harassment by one of Defendant's agents but this harassment occurred after the Plaintiff and Defendant hair salon had entered into a contract for hairstyling services.

7. At the time of the formation of the contract, the Defendant entered into a contract with the Plaintiff on racially neutral terms. See 109 S.Ct. at 2376-77.

8. The Defendant had a history of providing services for the Plaintiff and actively solicited black patronage.

9. The statements and conduct of Defendant's agent, Ms. Abbott, could be properly labeled racial harassment, but as Patterson has enunciated, this conduct, by

itself, is not actionable under section 1981 because if occurred after the Plaintiff formed the contract with the Defendant.

10. The Defendant hair salon contracted business with the Plaintiff on many occasions, including this one, on terms not tainted by racial animus.

11. With regard to Plaintiff's state law claim for intentional infliction of emotional distress, I shall decline to exercise pendent jurisdiction.

12. Although Plaintiff has failed to establish the alleged federal claim in this cause of action, the Plaintiff may not be without a remedy as the Plaintiff may pursue the intentional infliction of emotional distress claim in state court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDITH PERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMAND PERFORMANCE	:	NO. 89-2284

ORDER

AND NOW, this 22nd day of November, 1989, upon consideration of the motion of Defendant, Command Performance, for summary judgment, the response of Plaintiff, Edith Perry and argument presented to the court on said motion at the hearing on November 8, 1989, it is ORDERED that:

1. The motion of Defendant, Command Performance, for summary judgment is GRANTED.

2. Judgment is entered in favor of Defendant, Command Performance,

and against the Plaintiff, Edith Perry.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.

Filed August 30, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-2062

PERRY, EDITH
Plaintiff-Appellant

vs.

COMMAND PERFORMANCE
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 89-2284)

Argued: June 27, 1990

Before: SLOVITER and MANSMANN, *Circuit Judges* and THOMPSON, *District Judge*.*

(Filed August 30, 1990)

R. Michael Carr, Esquire (ARGUED)
LaBrum and Doak
1700 Market Street - Suite 700
Philadelphia, PA 19103
Attorney for Appellee

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* Honorable Anne E. Thompson of the United States District Court for the District of New Jersey, sitting by designation.

David R. Culp, Esquire (ARGUED)
1424 Chestnut Street, #500
Philadelphia, PA
Attorney for Appellant

OPINION OF THE COURT

THOMPSON, *District Judge*.

This is an appeal of the grant of summary judgment to the Defendant, Command Performance. Plaintiff, a black woman, brought this action against Defendant beauty salon claiming a violation of 42 U.S.C. §1981 and Pennsylvania law of intentional infliction of emotional distress. Plaintiff was refused service by one of the operators employed by Defendant beauty salon after making an appointment by telephone to have her hair done. The district court granted summary judgment because it viewed the hairdresser's conduct as racial harassment occurring subsequent to contract formation

and therefore not actionable under 42 U.S.C. §1981 under the interpretation of that statute enunciated in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). We conclude that the district court erred when it entered summary judgment on Defendant's behalf, because there was an insufficient basis on the record for the court to have concluded that a contract had been formed before the incident. As we have frequently stated, we review the grant of summary judgment de novo. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

I. FACTS

On the morning of October 12, 1987, Plaintiff's husband telephoned to the hair salon Command Performance in the King of Prussia Mall, to set up an appointment for his wife, Edith Perry. The appointment for Ms. Perry's "wash and set" was scheduled for noon on the same date.

Ms. Perry had had her hair done at this salon more than five times before by a number of different operators. On the date in question, Helene Kugler was scheduled to wash and set Ms. Perry's hair, as she had done previously. Not long after Ms. Perry arrived at the salon, Ms. Kugler explained to her that she had a bad cold and was not feeling well. She asked Ms. Perry is she would mind if another hairdresser were to do her hair. Ms. Perry consented. However, according

to Plaintiff's complaint and her deposition testimony, when Ms. Kugler asked Beth Abbott, another operator, to do Plaintiff's hair, Ms. Abbott responded loudly, "No, no, no, no! I don't do black hair. No, no, no, no! Not today! Ms. Abbott went on to exclaim, "I just don't do black people's hair! Oh no, I'm not going to do your hair. I'm from New Hampshire and I don't deal with blacks!"

Throughout Ms. Abbott's protest, Ms. Perry grew increasingly distraught and started to cry. She called the security police. Her husband was located within the Mall to escort her from the salon.[1]

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[1] There exists a factual dispute as to whether Ms. Kugler offered to wash and set Ms. Perry's hair after Ms. Abbott's outburst. Command Performance set a letter of apology, as well as an offer for a free wash and set to Ms. Perry after the incident. As noted at oral argument, it is unclear whether Command Performance or Ms. Abbott would be the appropriate defendant in this matter.

Plaintiff claims that she was traumatized by this incident and that as a result she suffered from hives and insomnia. In addition, she has pursued treatment with a psychiatrist.

II. BACKGROUND

Section 1981 provides, in relevant part, that "all persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. §1981 (1982). One year ago the Supreme Court decided the case of Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). While not overruling the landmark case of Runyon v. McCrary, 427 U.S. 160 (1976), the Court limited the scope of conduct covered by 42 U.S.C. §1981. Patterson, 109 S.Ct. at 2372, 2373; McKnight v. General Motors Corp. ____ F.2d _____, 1990 WL 89739 (7th Cir. 1990).

In Patterson the Plaintiff was a black woman who was employed by the defendant credit union as a teller and file coordinator for ten years until she was laid off. She subsequently brought an

action in the U.S. District Court for the Middle District of North Carolina, alleging that her employer had harassed her, failed to promote her, and discharged her because of her race and in violation of 42 U.S.C. §1981. Id. at 2368-69.

The Court held that §1981 "prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms.[2] Patterson, 109 S.Ct. at 2372. It does not extend to "problems that may arise later from the conditions of continuing

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[2] The Court further explained that the statutory protection against discrimination in the enforcement of contracts refers only to a prohibition of "discrimination that infects *the legal process* in ways that prevent one from enforcing contract rights, by reason of his or her race ..." *Patterson*, 109 S.Ct. at 2373 (emphasis added). This part of the Court's holding is not germane to the analysis of Ms. Perry's claim.

employment." Id. It followed that racial harassment in an employment context "is not actionable under §1981 ... Rather, such conduct is actionable under ... Title VII of the Civil Rights Act of 1964." Id. at 2374.[3]

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[3] Although appellant argues that the Court's references to Title VII signify that its opinion is limited to the employment discrimination conduct, the Court's discussion is in terms of §1981 in general, and we find no basis for such a distinction.

Plaintiff relies on a number of service cases that arose prior to Patterson. See e.g., Wyatt v. Security Inn Food and Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) (Plaintiffs were permitted to proceed to trial and recover on claims filed pursuant to 42 U.S.C. §§ 1981, 1985, 1986, and 2000(a). They alleged that defendant had discriminated against black lounge patrons by uneven enforcement of a policy which limited lounge access to drinking patrons only.); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974) (Contract between white resident and private swim club, which prohibited members' bringing black guests to the pool, but allowed resident to bring other guests upon payment of a fee, could be enforced by black guests as third party beneficiaries, pursuant to 42 U.S.C. §1981.); Hernandez v. Erienbusch, 368 F. Supp. 752 (D. Or. 1973) (Plaintiffs

In dismissing Plaintiff's civil rights claim in this case, the district court found that Ms. Perry had contracted with Command Performance at the time the appointment was made and that the contract was made "on racially neutral terms." The court further stated that, in accord with Patterson, § 1981 would appear as legal

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were permitted to bring claims pursuant to 42 U.S.C. §§ 1981, 1982 when they were served beer upon entering a bar, but were asked to leave when they began speaking Spanish.). We express no opinion on the effect of Patterson on these cases.

The scope of Patterson in the employment context is not before us. The Supreme Court, in deciding Jett v. Dallas Indep. School Dist., 109 S.Ct. 2702 (1989), assumed without deciding that a petitioner's rights under §1981 were violated by his removal and reassignment from his coaching position, which he alleged occurred because he was white. See also Hicks v. Brown Group, Inc., 902 F.2d 630, 638 (8th Cir. 1990) (Holding that discriminatory discharge is actionable under §1981 after Patterson decision because protection from racially motivated deprivations of contracts is essential to the full enjoyment of the right to *make* contracts.) (emphasis in original).

grounds for a claim only if the Defendant refused to enter into a contract with the Plaintiff altogether or on terms different than those afforded white patrons ...." App. at 101. The court found that neither of these circumstances occurred. It concluded therefore that although Defendant's acts "could be properly labeled racial harassment, [such conduct] is not actionable under §1981 because it occurred after the Plaintiff formed the contract with the Defendant." App. at 102 (emphasis in original).

III. DISCUSSION

The court on a motion for summary judgment must view the facts presented and inferences to be drawn in the light most favorable to the party opposing the motion for summary judgment. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970); Matthews v. Freedman, 882 F.2d 83, 84 (3d Cir. 1989). In this case, the district court's dismissal was based on its conclusion that the parties had entered into a contract at the time Ms. Perry's husband telephoned Command Performance to set up an appointment for his wife. However, the record is inadequate to determine if the refusal to serve Plaintiff occurred after the contract was made or was concurrent with the making of the contract. Arguably, an appointment for hair salon services is merely an invitation to negotiate, and

that acceptance of the offer occurs simultaneously to the performance of the contract. If that were the fact, then there would be no obligation to pay until, at least, the hairdresser began to render the services. Ms. Abbott's refusal to wash and set Ms. Perry's hair could be viewed as a declination to enter into a contract for services with Ms. Perry.[4] It is therefore necessary to remand this matter to the district court to more fully develop the record on the issue of whether

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[4] See Roberts v. Walmart Stores, Inc., 736 F. Supp. 1527, 1529 (E.D. Mo. 1990) (Defendant wrote race of plaintiffs on plaintiffs' check for payment of goods they sought to purchase. "After Patterson the resolution of this civil rights claim turns on an interpretation of the Missouri Commercial Code to determine whether the contract was formed at the time the alleged violation occurred. The court does not possess enough information about the retail transaction to ascertain whether a contract was already formed at the time defendant recorded the race of plaintiffs on the check.").

a contract was made at the time of the scheduling of the appointment, a fact the district court assumed but as to which there was no evidence. The court may wish to consider such factors as industry practice and the expectations of the parties to the instant case. Only if the district court determines as a matter of fact that there was a contract in existence at the time Plaintiff appeared at the salon could it characterize the hairdresser's conduct as post-contract behavior.

In addition, even if the district court concludes that Ms. Perry entered a contract with Command Performance at the time the appointment was made, the court must give the parties an opportunity to present evidence as to whether that contract was grounded on discriminatory terms, i.e., to provide

services only if a hairdresser were available who would be willing to wash and set a black patron's hair. Because it is possible to conclude from this record that a white woman with an appointment to see Ms. Kugler would have been provided services by Ms. Abbott, or at the least, would not have been denied services on the basis of her race, the contract itself may have been a violation of §1981. See Patterson, 109 S.Ct. at 2372, 2377. In that event, it would be consistent with Patterson to allow Plaintiff to proceed with her §1981 claim.

Because the court entered judgment for the Defendant, it never considered whether the conduct of the employee at issue was either authorized or a policy of Command Performance for which it may be held liable. Nor did it decide whether Defendant's acts were

intentionally discriminatory, for only intentional discrimination is actionable under 42 U.S.C. § 1981. Patterson, 109 S. Ct. at 2377 (citing General Building Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982)]. These matters remain for consideration on remand.

IV. CONCLUSION

For the reasons set forth, we conclude that there was an inadequate basis for the district court to have concluded that Ms. Perry's §1981 claim is barred by the Supreme Court's decision in Patterson. We will vacate the order of the district court and remand this matter for further proceedings consistent with this opinion. Costs are to be paid by the appellee.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDITH PERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMAND PERFORMANCE	:	NO. 89-2284

MEMORANDUM AND ORDER

J. M. KELLY, J. MARCH 27, 1991

This court how now considered the testimony that has been presented in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. Defendant, Command Performance, is a fictitious name used by Richmere Ltd., a Pennsylvania corporation. Defendant owned and operated a hair styling salon at "The Court", a shopping mall in King of Prussia, Pennsylvania.

2. Plaintiff, who is black,

visited the salon on seven occasions prior to October 12, 1987 and was served by both black and white hair stylists without incident.

3. On the morning of October 12, 1987, Plaintiff's husband telephoned the salon and made an appointment for Plaintiff to have her hair done at 12:00 p.m. on that day. In accordance with Plaintiff's usual practice, Plaintiff's husband made no request for any particular stylist at the salon and did not discuss the price of the service.

4. Helene Kugler, a white employee who was Assistant Manager of the salon, was scheduled to do Plaintiff's hair. Ms. Kugler had served Plaintiff on two prior occasions when Plaintiff visited the salon.

5. When Plaintiff arrived for her 12:00 p.m. appointment, Ms. Kugler

greeted the Plaintiff but explained that she was feeling unwell and suggested to Plaintiff that the other stylist on duty, Elizabeth Abbott, do Plaintiff's hair.

6. Plaintiff agreed to Ms. Kugler's suggestion that Ms. Abbott perform the services.

7. Ms. Abbott who was waiting on another customer overheard the conversation between the Plaintiff and Ms. Kugler, stated "No. No. No. I don't do black hair."

8. Ms. Abbott was an experienced hair stylist but was only recently employed by Defendant at the time of this incident and exercised no management or supervisory control of Defendant's salon.

9. The procedure to be performed on Plaintiff was a "wash & set" which is a basic procedure that should be

able to be performed by any experienced hair stylist regardless of the type of hair of the customer.

10. Ms. Abbott's declination to wait on Plaintiff was because of Plaintiff's race.

11. Ms. Kugler immediately attempted to calm Plaintiff, who had become upset, and offered to do her hair, an offer which Plaintiff declined. Ms. Kugler thereupon assisted Plaintiff in having her husband paged in contacting mall security and attempting to call Defendant's president, Richard Glover.

12. Mr. Glover immediately interviewed the employees involved and sent a letter of apology to Plaintiff, including a $50.00 gift certificate for use at any of Defendant's three hair salons. In part, Mr. Glover's letter stated, "We value your patronage and good

will and hope that we can continue to serve you in the future."

13. Plaintiff acknowledged receiving Mr. Glover's letter and admitted she had no reason to think that it was not sincere.

14. Defendant did not admonish or otherwise punish Ms. Abbott for her failure to wait on Plaintiff.

15. Defendant actively sought black customers prior to the above incident and never had a problem with servicing black customers prior to the incident in this case.

16. There is no evidence of any racial animus on the part of Defendant's officers of managers.

17. There is no evidence that Defendant intentionally inflicted emotional stress on Plaintiff.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter of this action pursuant to 28 U.S.C. §1331.

2. Plaintiff is a "person" within the meaning of 42 U.S.C. §1981.

3. Section 1981 prohibits discrimination on the basis of race in the making and enforcement of private contracts. Runyon v. McCrary, 427 U.S. 160 (1976).

4. Under §1981, a person's right to make contracts does not extend to conduct by a party after the contract relation has been established, such as breach of the terms of the contract. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Section 1981 only prohibits, "when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on

discriminatory terms." Id. at 176-77.

5. An enforceable contract exists where parties intend to conclude a binding agreement, and the essential terms are certain enough to provide basis for an appropriate remedy. Lombardo v. Gasparini Excavating Company, 123 A.2d 663 (Pa. 1956); Linnet v. Hitchcock, 471 A.2d 537 (Pa. Super. 1984). Upon Plaintiff's arrival at Defendant salon for her pre-arranged 12:00 p.m. appointment on October 12, 1987, Defendant's assistant manager confirmed that the "wash and set" services scheduled to be performed for Plaintiff by the assistant manager would be rendered to the Plaintiff, although by another hairstylist, and Plaintiff agreed. The services to be rendered were clearly defined and Plaintiff had impliedly agreed to pay the standard fee for that basic service. At that point, a race-neutral

contract was established between Plaintiff and Defendant for hairstyling services. The discriminatory conduct on the part of Ms. Abbott occurred after Plaintiff and Defendant had established a contract relation.

6. Plaintiff thus cannot establish a §1981 claim because the discriminatory conduct here occurred after formation of the contract between Plaintiff and Defendant. Patterson, 491 U.S. 164.

7. Even if Ms. Abbott's discriminatory conduct were part of the formation of the contract for services between Plaintiff and Defendant, Plaintiff cannot meet the burden of proof under §1981. A Plaintiff's burden of proof under §1981 is similar to that of Title VII, Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), except that

since §1981 can only be violated by purposeful discrimination, Plaintiff must prove actual discriminatory intent to establish a prima facie discrimination claim. General Building Contractors v. Pennsylvania, et al., 458 U.S. 375 (1982);

8. Discriminatory intent need not be proven directly, but may be inferred from the totality of the circumstances. Washington v. Davis, 426 U.S. 229 (1976).

9. Such factors as departure from normal procedures, history of discriminatory actions, and disparate impact upon a racial minority may be considered as evidence of discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981).

10. Here, no pattern or history

of discriminatory actions by Defendant exists. Other than the actions by Ms. Abbott on October 12, 1987, no prior incident of discrimination were established to have taken place at Defendant's salon, nor was any racial animus on the part of any other employee or officer of Defendant established with respect to any prior patrons, or with respect to Plaintiff. To the contrary, Defendant actively sought black customers. Plaintiff has thus failed to show circumstances from which a discriminatory motive could be inferred on the part of Defendant.

11. The imposition of vicarious liability for the acts of employees through the doctrine of respondeat superior is not permitted against a public employer, Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989).

Assuming that respondeat superior can apply to hold private defendants liable under §1981, there is no basis for such liability without, at the least, an agency relationship. See General Building Contractors Association, 458 U.S. at 395.

12. The finding of intentional discrimination necessary to a §1981 claim based on agency principles requires more than just a mere agency relationship. Where a clear agency relationship exists between the employer and a supervisory employee with control over the operations of the employer and the contractual status of the Plaintiff, liability may appropriately extend to the employer under §1981 for the actions of the supervisory employee. Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231 (5th Cir. 1989).

13. Ms. Abbott, a non-

supervisory employee of Defendant who exercised no management control of Defendant's Salon, did not have a relationship to Defendant such that the deliberate acts of Ms. Abbott were the deliberate acts of Defendant. Thus liability for the acts of Ms. Abbott should not extend to Defendant through agency principles under §1981. See Id. at 1236.

14. An employer may be held liable under §1981 for the discriminatory acts of a non-management employee if "the harassment was so pervasive that an inference of constructive knowledge arises." Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988). Ms. Abbott's discriminatory actions comprised an isolated incident, and did not approach the level of pervasive discrimination such that

Defendant should have known of Ms. Abbott's discriminatory behavior and taken steps to prevent it.

15. Plaintiff has not proved intentional discrimination of the part of Defendant by a preponderance of the evidence. Thus even if, contrary to this court's conclusion, Ms. Abbott's discriminatory actions were considered to be part of the formation of a contract between Plaintiff and Defendant, Plaintiff's cause of action under §1981 has not been sustained on the element of intentional discrimination.

16. For intentional infliction of emotional distress to occur, there must be intentional, outrageous or wanton conduct, peculiarly calculated to cause serious emotional distress. Papieves v. Lawrence, 263 A.2d 118 (Pa. 1970). See also Restatement (2d) Torts, §46 (1965).

Ms. Abbott's conduct, though reprehensible, was not the extreme, outrageous conduct that gives rise to a cause of action for intentional infliction of emotional distress. Thus Plaintiff has not proved intentional infliction of emotional distress by Defendant.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDITH PERRY,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
COMMAND PERFORMANCE,	:	
Defendant	:	NO. 89-2284

ORDER

AND NOW, this 27th day of March, 1991, in accordance with the foregoing findings of fact and conclusion of law, it is hereby ORDERED:

(1) As to Plaintiff's claim that Defendant discriminated against Plaintiff on the basis of her race in the

making of a contract, in violation of 42 U.S.C. §1981, judgment is entered in favor of the Defendant, Command Performance, and against the Plaintiff, Edith Perry;

(2) As to Plaintiff's claim that Defendant intentionally inflicted emotional distress upon the Plaintiff, judgment is entered in favor of the Defendant, Command Performance, and against the Plaintiff, Edith Perry.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.

No. 91-896

In The

Supreme Court of the United States

October Term, 1991

EDITH PERRY,

Petitioner,

vs.

COMMAND PERFORMANCE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PERRY S. BECHTLE
Counsel of Record
R. MICHAEL CARR
LABRUM AND DOAK
Attorneys for Respondent
561 East Market Street
Bethlehem, Pennsylvania 18018
(215) 865-2644

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In this Section 1981 action, petitioner, who is black, alleged that the respondent beauty salon (the "Beauty Salon" or "respondent") denied her service on the basis of race. Following a non-jury trial in February, 1991, the trial court found that

petitioner failed to prove intentional discrimination by the Beauty Salon. On September 11, 1991, the Third Circuit Court of Appeals affirmed the decision of the trial court, without opinion.

COUNTER-STATEMENT OF THE FACTS

Prior to October 12, 1987, petitioner, who is black, was a regular customer at the Beauty Salon. Plaintiff was regularly served by both black and white hair stylists at the Beauty Salon without incident. Contrary to the petition, the Beauty Salon actively solicited black patronage and there was no evidence that the Beauty Salon ever employed a "whites only" hair stylist.

On the morning of October 12, 1987, petitioner arrived at the Beauty Salon for a scheduled appointment. She was greeted by the manager, who was white. The manager said that she had caught a cold and asked petitioner whether she would mind if the other hair stylist on duty served petitioner. However, when the other hair stylist on duty, Elizabeth Abbott ("Abbott"), was called over to petitioner, she stated, "I don't do black hair". Abbott had recently moved from New Hampshire and testified that she had little experience doing black hair. Abbott had worked at the Beauty Salon only about one month at the time of the incident.

The manager repeatedly offered to do petitioner's hair herself, but petitioner refused. The manager assisted petitioner in attempting to call the owner of the Beauty Salon and, thereafter, in having petitioner's husband called to the Beauty Salon. After the arrival of petitioner's husband, petitioner left the Beauty Salon.

Following the incident, Richard Glover ("Glover"), the president and owner of the Beauty Salon, immediately travelled to the Beauty Salon to investigate the matter. He obtained statements from both hair stylists on duty. Throughout the incident

and subsequent investigation, Abbott insisted that her refusal to serve petitioner was based only on her lack of confidence in doing black hair.

As a result of the incident, the Beauty Salon immediately took several steps to remedy the situation. On October 15, 1987, Richard Glover's wife, Meredith Glover, addressed a letter of apology to petitioner which stated, in part, "we value your patronage and good will and hope that we can continue to serve you in the future". A $50.00 gift certificate was enclosed with the letter. Petitioner acknowledged receiving the letter and admitted she had no reason to think that it was not sincere.

In addition, a letter of reprimand was addressed to Abbott. The letter provided for a "plan of action to assist Abbott in learning proficiency with black hair styles." The letter stated in part, " 'I don't do . . .' is not a part of our vocabulary at Command Performance, and you should eliminate it from yours."

Shortly after the incident on October 12, 1987, Abbott resigned from her employment with the Beauty Salon.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE PETITION, THE LIMITS OF *PATTERSON v. MCLEAN CREDIT UNION* IS NO LONGER AN IMPORTANT QUESTION OF FEDERAL LAW.

In her petition for writ of certiorari, petitioner argues that the Supreme Court should grant certiorari in this case to review the limits of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), holding that Section 1981 applies only to "post-contract formation" conduct. The lower court relied, in part, upon

Patterson in concluding that petitioner's race discrimination claim was not actionable under Section 1981 because it involved "post formation" conduct.

Section 101 of the Civil Rights Act of 1991 (the "1991 Act") amended Section 1981, in pertinent part, as follows:

> "(2) By adding at the end the following new subsections:
>
> (b) for purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> * * *

Thus, § 101 of the 1991 Act reverses the decision of this Court in the *Patterson* case. As a result, the limits of *Patterson* are no longer an important question of federal law.[1]

Moreover, based upon the facts as found by the trial court, it is clear that *Patterson* was correctly applied in this case. Upon petitioner's arrival at the Beauty Salon, respondent's manager confirmed that the service scheduled to be performed for petitioner by the manager would be rendered to petitioner, although by

---

1. Petitioner does not argue that the 1991 Act should be applied retroactively to this case. By its terms, of course, the 1991 Act "takes effect upon enactment." *See* 1991 Act, § 402(a). *See also, U.S. Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908) (holding that a statute "ought not to receive [retroactive] construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied").

another hair stylist, and petitioner agreed. The services to be rendered were clearly defined and petitioner had impliedly agreed to pay the standard fee. Since Abbott's actions occurred only afterwards, it is clear that petitioner's claims related to "post formation" conduct. No basis whatever exists for petitioner's argument that *Patterson* should apply exclusively to Title VII cases.

II.

NO IMPORTANT QUESTION AS TO THE APPLICATION OF *RESPONDEAT SUPERIOR* IS IMPLICATED IN THIS CASE.

In the alternative, the trial court found that, under the facts of this case, petitioner failed to prove discriminatory intent on the part of the Beauty Salon. Under § 1981, plaintiff must prove actual discriminatory intent to establish a prima facie discrimination claim. *General Building Contractors v. Pennsylvania, et al.*, 458 U.S. 375 (1982).

Contrary to petitioner's statement of the facts, Abbott had only recently been hired by the Beauty Salon. No evidence was presented that she had previously refused to serve a black customer. On the contrary, it was obvious that the manager fully expected Abbott to serve the petitioner when she was requested to do so.

Contrary to petitioner's statement of facts, the Beauty Salon had no history of employing a "whites only" hair stylist or of referring all black patrons to a black hair stylist. Indeed, petitioner herself was served by both black and white hair stylists during the time that she was a regular customer.

It is also clear that the Beauty Salon took immediate, concrete steps to give Abbott the additional training she claimed she needed to serve black customers. The letter of reprimand which the Beauty

Salon issued to Abbott required her to undertake a "plan of action" to address the situation. As a result, the lower court correctly found that there was no evidence whatever of any racial animus on the part of respondent's officers or managers.

Under the somewhat unusual facts of this case, the lower court correctly found that the offending employee's discriminatory actions comprised "an isolated incident, and did not approach the level of pervasive discrimination such that the defendant should have known of Ms. Abbott's discriminatory behavior and taken steps to prevent it." (App. 42, paragraph 14).

Many circuit courts have found that the doctrine of *respondeat superior* applies to employers under § 1981 or Title VII *only* where the employer knew or should have known of the discriminatory propensity of a non-supervisory employee. *See Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989); *Hunter v. Allis-Chalmers Corp., Engine Division*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Levendos v. Stern Entertainment*, 909 F.2d 747 (3d Cir. 1990).

Despite petitioner's repeated misstatements to the contrary, there is absolutely no evidence that the manager had any involvement whatsoever in Abbott's actions. When Abbott refused to serve petitioner (whether because of her claimed lack of experience or because of racial animus), the manager immediately offered to serve petitioner herself. This offer was declined. Since it is obvious that the manager expected Abbott to serve petitioner and took prompt action to remedy the situation, it is clear that the district court correctly found that there was no basis for applying the *respondeat superior* doctrine in this case.[2]

---

2. Many of the lower court decisions referred to by petitioner are inapposite (Cont'd)

CONCLUSION

It is clear that petitioner's contention that this case presents important issues under the civil rights laws is ill-founded. At most, this case involved an isolated incident, without precursor, and which the evidence showed was immediately disavowed by the Beauty Salon. Even if *Patterson* had any continuing viability (which it certainly does not), there are no special or important reasons for the grant of certiorari in this case. Accordingly, the petition should be denied.

Respectfully submitted,

PERRY S. BECHTEL
R. MICHAEL CARR
LABRUM AND DOAK
Attorneys for Respondent

(Cont'd)

here because the court was merely passing upon a motion for summary judgment. Obviously, whether the application of *respondeat superior* may be disposed of by summary judgment is not an issue in this case. *See, e.g., Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990); *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243, (D.D.C. 1990).